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NO. 88-1983

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ROBERT DAVIS, VIRGINIA DAVIS, WILLIAM DAVIS, DYNAMIC GENES, INC., A DELAWARE CORPORATION, F/K/A BIG D SEED CO., A DELAWARE CORPORATION, DAVIS HYBRID CORN CO., AND DAVIS SEED FARMS,

PETITIONERS,

VS.

FIRST NATIONAL BANK OF WESTVILLE, A NATIONAL BANKING ASSOCIATION AND FIRST NATIONAL BANK OF DANVILLE, A NATIONAL BANKING ASSOCIATION,

RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

The Petitioners' statement of the case misstates the facts in two particulars. First, the complained of requirement in the loan agreement does

not require liquidation of the business within sixty days. It requires that they enter into a contract within 60 days which would require liquidation within approximately one year. Second, Petitioners state that they had never been in default, whereas the record cited for this statement shows that they were not in default prior to January, 1984, i.e. approximately 18 months before the execution of the loan agreement. The recitals in the loan agreement acknowledge that the Petitioners had been in default by reason of non-payment of matured notes for four months prior to the loan agreement. (See maturity dates on notes as compared to the date of execution of the loan agreement. A-13, A-16) The Petitioners had not been technically in default prior to January, 1984, because the banks had repeatedly renewed existing loans despite dramatic

recurrent sustained and severe operating losses over a period of years. A-51

ARGUMENT

The loan was intended to provide the Petitioners with short-term operating capital so they would have an opportunity to sell the business assets, which constituted collateral for the loan, as a going business, which, it was hoped by both parties, would result in a realization of more money to apply to the debt. The alternative was a judicial sale through foreclosure or bankruptcy. It had become obvious to the banks that the business could not sustain itself and the only source of repayment of the large existing debt as well as the new loan was the sale of the assets. A-51 The credit requirement of liquidation of assets was no more than an effort by the banks to protect their investment.

The Petitioners appear to misapprehend what both the District Court and the Circuit Court of Appeals have held. Neither held that the Petitioners as Plaintiffs, must show that the act of the banks complained of had an anti-competitive effect on commerce. Both Courts stated the practice complained of was "in no way anti-competitive", i.e. it was not anti-competitive in nature.

The Petitioners overlook or ignore the distinction between the anti-competitive nature of a practice as opposed to the anti-competitive effect of a practice. If the act of a bank complained of can conceivably lessen competition, a Plaintiff who prosecutes a 1972 claim need not show, by specific instance, that the practice did in fact lessen competition to some degree. On the other hand, if the act of a bank

complained of could not conceivably lessen competition, then such act cannot constitute a violation of Sec. 1972 because this law is intended only to prohibit anti-competitive practices. It is only common sense to realize that if a practice is not of the nature contemplated by the purpose of the act then it is not violative of the act. To hold otherwise would be absurd. Banks would be unable to know what the law required or what practices would constitute a violation of the act. The prohibition of an act must be reasonably clear so that the persons regulated may know what is expected of them.

Respectfully Submitted,

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